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FILED
AUG 14 1899
JAMES H. McKENNEY,
Clerk.

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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 4, Original.

EX PARTE: IN THE MATTER OF JONAS GROSSMAYER, PETITIONER.

ANSWER OF RESPONDENT.

WM. W. MACFARLAND,
Attorney for Respondent.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 8-12-'99

IN THE

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EX PARTE: IN THE MATTER OF JONAS GROSSMAYER, PETITIONER.

ANSWER OF RESPONDENT.

To the Supreme Court of the United States:

David E. Bryant, as judge of the circuit court of the United States for the eastern district of Texas and on behalf of the said court, in compliance with the rule entered upon the above petition, returns as follows:

The petitioner, Jonas Grossmayer, brought an action in the said circuit court for the eastern district of Texas against R. G. Dun and Robert D. Douglass, carrying on business under the name of R. G. Dun & Co., and the complaint in that action is correctly set forth as Exhibit "A" to the above petition. A summons was issued upon the said complaint, requiring the marshal to summon "R. G. Dun & Co." if to be found within the district, to answer the complaint. A

correct copy of the said summons is set out as Exhibit "B" to the above petition.

The said summons was served upon the person and in the manner stated in the endorsement of the marshal on the summons, as set forth in the said Exhibit "B."

The action so brought was in due course of practice placed upon the docket of the said circuit court, and at a sitting of the court held on the 23d of February, 1899, the cause was duly called for suitable proceedings therein; whereupon John C. Walker, Esq., an attorney of the said circuit court, appeared specially for the said defendants in the action for the purpose of suggesting that the defendants had not been duly and lawfully served with process. The suggestion was in writing, it was duly filed, and it is set forth in the printed paper, with the endorsement thereon, at page 9 of the above petition, marked No. 1.

The suggestion so as above made and filed was accompanied by an affidavit of the said John C. Walker, of the same date and filed at the same time. The said affidavit and the endorsement thereon is set out in the above petition, and is the paper marked 2, on page 10 thereof. By this affidavit it was made to appear that the defendants, Robert G. Dun and Robert D. Douglass, were copartners, and that neither of them were residents of the eastern district of Texas. At the same time an affidavit of John Fowler, the person upon whom the summons was served by the marshal, as aforesaid, was filed in the action, by which it appeared that he, the said Fowler, was not an agent of the defendants or of either of them for the purpose of accepting service of the said summons or other process. The said affidavit, with the endorsement thereon, is set out on pages 12 and 13 of the above petition.

The petitioner, Jonas Grossmayer, plaintiff in the said action, by his attorney therein, thereupon moved the said court to enter judgment against the defendants Dun and Douglass as by default. The motion was denied, and the order thereon is set out on page 14 of the above petition.

The said circuit court of the United States for the eastern district of Texas took judicial cognizance of the said special appearance on behalf of the defendants Dun and Douglass for the purpose of raising the question as to the validity of the service of the said summons, and as to whether in point of law it was valid and sufficient to bind the defendants or either of them and give the court jurisdiction to render judgment against them.

The said circuit court duly considered the motion so made on behalf of the said defendants, together with the proofs in support thereof, and also the return of the marshal as to the service of the said summons. Upon such consideration the court held and adjudged that the service of the summons was insufficient and invalid, and that the court was without jurisdiction to render judgment against the said defendants.

All of which is respectfully submitted.

D. E. BRYANT,
United States District Judge, Eastern District of Texas.

No 6 Orig.

6 Orig.

In Supreme Court of United States.

EX PARTE JONAS GROSSMAYER.

Brief on Motion for Leave to File Petition for Mandamus and Upon Petition for Mandamus.

KNAPP BROS., STATIONERS & PRINTERS, BALTO.

In Supreme Court of United States,

EX PARTE JONAS GROSSMAYER.

Brief on Motion for Leave to File Petition for Mandamus and Upon Petition for Mandamus.

STATEMENT.

Jonas Grossmayer, by printed petition in the hands of the Clerk of this Court, prays for the writ of mandamus requiring the Honorable David E. Bryant, Judge of the District Court of the United States for the Eastern District of Texas, to render a judgment by default in a certain cause pending in the Circuit Court of the United States for the Eastern District of Texas, wherein the said Jonas Grossmayer, a citizen of said District, is plaintiff, and Robert G. Dun, a citizen of the State of New York, and Robert D. Douglas, a citizen of the State of New Jersey, are defendants, or show cause why he does not do so.

Judge David E. Bryant was the only judge presiding in said cause in said Circuit Court, and was the sole judge presiding at the February term, 1899, of said court, when said cause was called

for a hearing, and a judgment by default was applied for in behalf of Jonas Grossmayer.

The judge presiding, the Honorable David E. Bryant, declined and refused to render a judgment by default.

The cause of action set forth in plaintiff's petition filed in said cause is, in substance: That Robert G. Dun and Robert D. Douglas were, at the time of the grievance complained of and for a long time prior thereto and at the time of filing plaintiff's petition, doing business in the State of Texas as an association, which was originally composed of the aforesaid Robert G. Dun, and Robert D. Douglas, and Erastus Wiman, and Arthur J. King, and that John Fowler, a resident of Galveston County, in the State of Texas, was the local agent and representative of said Robert G. Dun and Robert D. Douglas, doing business as an association under the name of R. G. Dun & Co. That as an association doing business in the State of Texas and in all the cities and towns in the United States, by means of local agents, the said R. G. Dun & Co. published and circulated in all the cities and towns in the United States a false and defamatory statement in writing of and concerning the said Jonas Grossmayer as a merchant, and that said Jonas Grossmayer, as a merchant, was injured by said false and defamatory publication in the sum of fifty thousand dollars.

A citation to said R. G. Dun & Co. to answer plaintiff's petition, and returnable to the February term, 1899, was issued by the Clerk of said Court and was served by the marshal of said District by a delivery to said John Fowler, as the local agent and representative of said R. G. Dun & Co. of a true copy of said citation and a certified copy of plaintiff's petition.

The said R. G. Dun & Co. did not file any answer to plaintiff's petition and did not enter any appearance in said cause.

Upon the call by the court of said cause upon the default docket

plaintiff moved the court for a judgment by default against said R. G. Dun & Co.

The court refused upon plaintiff's motion to render a judgment by default in said cause.

Article 1223 of the Revised Statutes of 1895, of Texas, is as follows:

"In any suit against a foreign private or public corporation, joint stock company or association or acting corporation or association, citation or other process may be served on the president, vice-president, secretary or treasurer, or general manager, or upon any local agent within this State, of such corporation, joint stock company or association or acting corporation or association."

First Proposition.

When two or more non-resident persons are alleged to be an association in the carrying on of a common business, and are engaged as an association in carrying on such business in all the cities and towns in the United States, including those in the State of Texas, and are carrying on such business through and by means of local agents resident in such cities and towns, such persons so carrying on such business in the State of Texas, through local agents resident in the State of Texas, must be considered and held as constituting an association within the meaning of Article 1223 of the Revised Statutes of 1895, of the State of Texas."

ARGUMENT AND AUTHORITIES.

Mr. Sutherland, in his admirable discussion of the principles of statutory interpretation, has deduced the following rules of construction, which are respectfully submitted, as follows:

"The general intent of a statute is a key to the meaning of its "parts. The presumption is that the law-maker has a definite pur-

" pose in every enactment and has adapted and formulated the " subsidiary provisions in harmony with that purpose; that these " are needful to accomplish it; and that if they have the intended " effect, they will, at least, conduce to effectuate it. That purpose " is an implied limitation on the sense of general terms, and a " touchstone for the expansion of narrower terms. This intention " affords a key to the sense and scope of minor provisions. From " this assumption proceeds the general rule that the cardinal pur- " pose or intent of the whole act shall control, and that all the " parts be interpreted as subsidiary and harmonious." (Suther- land on Statutory Construction, sec. 240.)

Mr. Sutherland continues: "No clearer statement has been or " can be made of the law as to the dominating influence of the in- " tention of a statute in the construction of all its parts than that " which is found in Kent's Commentaries, which Mr. Sutherland " quotes as follows: In the exposition of a statute, the intention of " the law-maker will prevail over the literal sense of the terms; " and its reason and intention will prevail over the strict letter. " When the words are not explicit, the intention is to be collected " from the context; from the occasion and necessity of the law; " from the mischief felt and the remedy in view; and the intention " is to be taken or presumed according to what is consonant with " reason and good discretion. The mere literal construction ought " not to prevail, if it is opposed to the intention of the legislature " apparent from the statute, and if the words are sufficiently flexi- " ble to admit of some other construction by which that intention " can be better effected, the law requires that construction to be " adopted.

"The intention of an act involves the consideration of its sub- " ject matter or the change in or an addition to the law which it " proposes; hence the supreme importance of the rule that a stat- " ute should be construed with reference to its general purpose

" and aim. 'Where the words,' says Lush, J., in Williams vs. Ellis,
" 'L. R. 5 Q. B. Div., 'do not directly apply to the particular case,
" 'we must consider the object of the act.'" (Sutherland, p. 320-1.)

"The natural import of words is their literal sense; but this may " be greatly varied to give effect to the fundamental purpose of a " statute. The mere literal construction of a section in " a statute ought not to prevail if it is opposed to the " intention of the legislature apparent by the statute; " and if the words are insufficiently flexible to admit " of some other construction, it is to be adopted to ef- " fectuate that intention. * * * * * * The particular in- " quiry is not what is the abstract force of the words or what they " may comprehend, but in what sense they were intended to be used as they are found in the act. The sense in which they " were intended to be used furnishes the rule of interpretation, " and this is to be collected from the context, and a narrower, or " more extended meaning is to be given according to the intention " thus indicated." (Sutherland, 245-6.)

Again: "The sense in which general words, or any words, are " to be used, furnishes the rule of interpretation, and this is to be " collected from the context; and a narrower or more extended " meaning will be given according as the intention is thus indi- " cated. * * * * * * Hence, though a general term fol- " low specific words, it will not be restricted by them, when the " object of the act and the intention is that the general word shall " be understood in its ordinary sense." (Sutherland, 361.)

Mr. Lieber says: "Words of a relative or of a generic meaning must be taken in a relative or expansive sense, if the character and object of the text oblige us to do so, but not if they have been used to express something definite or absolute." (Lieber's Hermeneutics, 130.)

The words "everybody, politic or corporate, and person or persons," were held to extend to parishes, though they are neither bodies corporate or politic or persons.

Rex. vs. Inhabitants of Bartow, 11 A. & E., 343.

Second Proposition.

State laws authorizing the service of citation upon the local agent of non-resident or foreign corporations and associations of persons who carry on business in the State of the domestic forum, are recognized by this court as valid and effectual to give the Circuit Courts of the United States jurisdiction to render a judgment in personam against such non-resident corporations and associations, and the service of the citation in the case at bar is valid.

AUTHORITIES.

Conn. Life Ins. Co. vs. Spratley, 172 U. S., 602.

Ex Parte Schollenberger, 96 U. S., 369.

Third Proposition.

Where a Circuit Court of the United States has jurisdiction of a cause and refuses to do what it ought to do in the due exercise of its jurisdiction, this court may issue the writ of mandamus to require the judge of such court to do what he ought to do in the premises.

AUTHORITIES.

Ex Parte Schollenberger, 96 U. S., 369.

Ex Parte Parker, 126 U. S., 737.

Ex Parte Hollan Parker, 131 U. S., 221.

Ex Parte Hohorst, 150 U. S., 653.

Respectfully submitted,

Jonas Grossmayer